Cleveland Construction, Inc. *and* Southwest Ohio District Council of Carpenters, AFL–CIO. Case 9–CA–30636

August 31, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On June 1, 1993, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 9–RC–15828. (Official notice is taken of the ''record'' in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed its answer admitting in part and denying in part the allegations in the complaint.

On July 6, 1993, the General Counsel filed a Motion for Summary Judgment and Motion to Strike, and a memorandum in support. On July 9, 1993, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On August 10, 1993, the Respondent filed a response to the Notice to Show Cause and a motion to vacate the Union's certification and dismiss the complaint.

Ruling on Motion for Summary Judgment

In its answer and response to the Notice to Show Cause the Respondent admits that the Union was certified by the Regional Director on March 4, 1993, as the exclusive collective-bargaining representative of the unit, but attacks the validity of the certification on the basis of its objections to the election in the representation proceeding.[1] In addition, the Respondent contends that events occurring since the representation hearing, including the cessation of all work and the permanent layoff of all the unit employees at its VA hospital project in Dayton, the transformation of its Columbus field office into a full-fledged, functionally separate branch office with complete autonomy over day-to-day operations, and the drastic expansion of its Mason branch office, have rendered the unit no longer appropriate.

It is well established that, in the absence of newly discovered or previously unavailable evidence or special circumstances, a respondent is not entitled to relitigate issues which were or could have been litigated in the representation proceeding in the subsequent 8(a)(5) refusal-to-bargain proceeding.[2] Here, all issues raised by Respondent concerning its objections to the election were or could have been litigated in the prior representation proceeding. Accordingly, we find that they do not warrant relitigation in this proceeding.

As for Respondent's contention that events have rendered the unit no longer appropriate, such evidence cannot in the instant circumstances in any way be considered newly discovered or previously unavailable. First, the fact that the VA hospital project was of limited duration and would be completed between June and September 1991 was specifically raised and considered by the Acting Regional Director and the Board in the representation proceeding. Second, as indicated in Respondent's brief and the affidavits accompanying its response to the Notice to Show Cause, the last layoff from the VA hospital project and most if not all of Respondent's other alleged operational and organizational changes occurred over a year ago.[3] Thus, even assuming, as Respondent contends, that all the unit employees at that project were permanently laid off after the project's completion in 1991, and that the other operational and organizational changes have also occurred as alleged by Respondent, the Respondent has failed to show why it could not have brought forth that evidence prior to issuance of the March 4, 1993 certification.

Nor do we find that Respondent's allegations otherwise raise special circumstances warranting relitigation. Although the VA hospital project in Dayton may have been the Respondent's largest project at the time of the representation hearing, it was not its only project in the geographic area encompassed by the certification, and Respondent does not contend that it is no longer working projects in that area. Indeed, according to Respondent, while it no longer has any significant projects in Dayton, its operation in Mason has greatly expanded. While it may be that none of the former unit employees who worked at the Dayton project and who voted in the election have been rehired at Respondent's other projects in the unit area, this is not a basis for recon-

[1] In both its answer and its response to the Notice to Show Cause, the Respondent also contends that the Regional Director's certification was improper inasmuch as Respondent's Objections 2 thru 10, which the Board had held in abeyance in its April 2, 1992 Order, were still pending and had never been considered or addressed by the Board. Respondent's contention is without merit. Although not readily apparent from the Board's subsequent February 10, 1993 Order, all of Respondent's objections were in fact subsequently considered by the Board in denying Respondent's request for review of the Regional Director's third supplemental decision.

[2] See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

[3] Although Respondent's brief cites an affidavit given by Respondent's vice president, Jon Small, as support for its contention that the drastic expansion of Respondent's Mason branch office occurred ''subsequent to certification,'' in fact Small's affidavit nowhere mentions when the expansion in that office began or was completed.

sidering the Union's certification.[4] Finally, given the variety of factors relied on by the Acting Regional Director and the Board in determining the appropriate unit, and taking into account the fluctuating nature of the construction industry generally, we find that the other operational and organizational changes alleged by Respondent are also not the kinds of changes which would warrant reopening the representation proceeding.

Accordingly, we deny Respondent's motion to vacate the Union's certification and dismiss the complaint, and grant the General Counsel's Motion for Summary Judgment.[5]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with a facility at Mason, Ohio, has been engaged as a commercial and industrial contractor in the construction industry. During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its operations, purchased and received at the Mason, Ohio facility goods valued in excess of $50,000 directly from points outside the State of Ohio. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held September 13, 1991, the Union was certified on March 4, 1993, as the collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time carpenters and apprentice carpenters employed by the [Respondent] within its Mason, Ohio area, excluding all office clerical employees, all other employees, and all professional employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since March 10, 1993, the Union has requested the Respondent to bargain and, since March 17, 1993, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after March 17, 1993, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Cleveland Construction, Inc., Mason, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Southwest Ohio District Council of Carpenters, AFL–CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employ-

[4] See, e.g., *NLRB v. Action Automotive*, 284 NLRB 251 (1987), enfd. 853 F.2d 433 (6th Cir. 1988), cert. denied 488 U.S. 1041 (1989); and *Murphy Bros., Inc.*, 265 NLRB 1574 (1982) (employee turnover not the kind of ''unusual circumstance'' within the meaning of Supreme Court's decision in *Ray Brooks v. NLRB*, 348 U.S. 96 (1954), that would permit rebuttal of union's majority status or warrant reexamination of certification).

[5] Cf. *SOHIO Petroleum Co.*, 239 NLRB 281 (1978), enfd. 625 F.2d 223 (9th Cir. 1980). Although Respondent in its answer to the complaint also denies the complaint's allegations that the Union requested Respondent to bargain on or about March 10, 1993, and that the Respondent on or about March 17, 1993, refused to do so, the General Counsel has submitted with its motion copies of the correspondence between the parties evidencing these facts, and the Respondent has not disputed the authenticity of that correspondence. Accordingly, we find that Respondent's denials do not raise any issues warranting a hearing. Finally, in view of this ruling, we find it unnecessary to pass on the General Counsel's Motion to Strike.

ment, and if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time carpenters and apprentice carpenters employed by the [Respondent] within its Mason, Ohio area, excluding all office clerical employees, all other employees, and all professional employees, guards and supervisors as defined in the Act.

(b) Post at its facility in Mason, Ohio, copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Southwest Ohio District Council of Carpenters, AFL–CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time carpenters and apprentice carpenters employed by us within our Mason, Ohio area, excluding all office clerical employees, all other employees, and all professional employees, guards and supervisors as defined in the Act.

CLEVELAND CONSTRUCTION, INC.